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No. 87-1505

In the Supreme Court of the United States

OCTOBER TERM, 1987

HARRY SHERMAN FLAVEL,

Petitioner,

v.

STATE OF OREGON,

Respondent.

On a Petition for a Writ of Certiorari
to the Supreme Court of Oregon

BRIEF IN OPPOSITION TO ISSUANCE OF WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Does the Due Process Clause entitle a criminal defendant to a new trial when, after trial, the parties learn that a witness was hypnotized as a means of therapy to cope with pain and trauma, but not to enhance the witness's memory of what occurred?

2. Does Oregon's evidentiary prohibition on admitting polygraph results in criminal cases violate a defendant's constitutional right to present a defense as secured by the Due Process or Confrontation and Compulsory Process Clauses?

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STATEMENT OF THE CASE

Statement of Facts.

Respondent accepts petitioner's statement of facts only as supplemented by additional facts discussed in the argument below.

REASONS TO DENY THE WRIT

I. This case does not present the question on the admissibility of the post-hypnotic testimony that petitioner seeks to have resolved.

Petitioner argues that the Court should grant review to resolve lower court conflicts on the admissibility of hypnotically influenced testimony in criminal cases. Petitioner points to three different approaches lower courts take in deciding whether to admit testimony of a witness who has been hypnotized in an effort to restore or enhance his or her memory. Additionally, petitioner relies on expert testimony in this record and observations of courts and commentators about the unreliability of hypnotically refreshed testimony. His federal constitutional claim is that he has a Confrontation Clause right to cross-examine effectively the witnesses against him, a right that is impaired or defeated by possible "suggestion," "confabulation" and "memory hardening" caused by memory-enhancement hypnosis. He also argues that post-hypnotic testimony is so inherently unreliable as to violate the Due Process Clause.

A. The facts of this case do not involve hypnosis of the kind that has divided lower courts.

The state agrees that lower appellate courts are significantly divided on the admissibility of a witness's testimony after the witness has been hypnotized for purposes of enhancing memory on the subject matter of the testimony. This case, however, does not factually present that question.

Petitioner's challenge to the victim's testimony arose after trial when the prosecutor attempted to assess the victim's

damages for purposes of requesting restitution at sentencing. The prosecutor discovered that the victim had gone to a counselor who hypnotized the victim as a means of therapy to cope with insomnia, pain and other consequences of his stab wound. When defense counsel learned of the therapy through the restitution request, he moved for a new trial.

At the hearing on the motion, the victim testified that he recalled what was said during the hypnosis sessions, and that he did not discuss the particular facts of the stabbing incident. (Tr. 1861-64). Although the counselor had no specific memory of what he said during the sessions, he believed that the stabbing probably had been discussed in some fashion. However, he was very sure he did not question the victim about the circumstances of the stabbing incident itself or discuss the incident in detail. (Tr. 1804, 1810-11, 1815, 1819-21, 1827-28, 1834-35). The victim and the counselor both agreed that the hypnosis had been directed at the victim's problems of insomnia, physical pain, and anxiety. (Tr. 1810, 1862-64). Contrary to the implication at pages 8 and 24 of the petition, the victim's "feelings of guilt" for which he was counseled did not relate to his actions during the stabbing incident, but rather to the fact that his physical injuries prevented him from working and supporting his family, and from entering the Army as he had intended to do. (Tr. 1834-35, 1842-48).

Petitioner called a hypnosis expert, Dr. Abrams. He testified that when hypnosis probes a person's memory of specific events, the hypnosis process can alter a subject's recollection and change his or her confidence level in the memory. (Tr. 1870-76). He conceded, however, that if the hypnotherapy in this case was limited to dealing with the mental and physical effects of the stabbing and did not concentrate on the victim's memory of the incident itself, it would not render the victim's testimony unreliable. (Tr. 1894). Because the hypnotherapy sessions were not recorded, petitioner's expert could not

express an opinion on whether they affected the victim's testimony. (Tr. 1877-78).

The trial court affirmatively found that neither the prosecution nor the defense was previously aware that the victim had been hypnotized. The trial court also found that there was "some" discussion of the stabbing incident in the course of the therapy and that neither the victim nor the counselor could recall the exact amount or depth of that discussion. However, the court determined that the hypnosis was a means of treatment for overcoming the physical and psychological impact of the victim's injury. After concluding that petitioner was afforded a fair trial, the court denied the motion for a new trial. (Order, Pet. Cert. App-1 - App-7).

As the facts reveal, this simply is not a case involving hypnotically refreshed testimony. The victim did not suffer any memory loss and the hypnosis was not designed to restore or refresh what the victim remembered about the crime. Instead, this hypnosis was a form of personal counseling. Like other forms of counseling that victims commonly seek (*e.g.*, therapeutic discussion with mental health professionals, clergy, victims' support groups, family and friends), it was designed to help the victim handle the emotional trauma and physical pain of his injuries and disability. Even petitioner's expert agreed that hypnosis for this purpose, if it does not dwell on the victim's recollection of the circumstances of the crime, does not present the risks that arguably attend to hypnosis designed to enhance memory. This case thus presents a relatively rare set of facts, one that falls outside the rationale of the decisions petitioner cites and that has not created a difficult evidentiary question for lower courts.[1] Review would not provide an opportunity to resolve

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[1] We can conceive of analogous contexts in which this issue might arise. For example, a rape victim who suffers sexual dysfunction as a conse-

(Footnote continued on next page)

the split of authority on the admissibility of hypnotically refreshed testimony.

B. This case is in the wrong procedural posture to resolve the narrow issue of the admissibility of post-hypnotic testimony.

The petition glosses over a second impediment to resolution of the hypnosis issue it attempts to present. As the facts unequivocally establish, neither the prosecutor nor the defense attorney knew at the time of trial that the victim had been hypnotized for any purpose. In effect, the prior hypnotherapy was in the nature of newly discovered evidence that petitioner argued should result in a new trial. Thus, this case does not directly present the question of whether and under what circumstances post-hypnotic testimony is constitutionally admissible in a criminal case. Rather, the issue is a significant step removed: whether a criminal trial constitutionally must be reopened when the parties discover post-trial that a witness previously was hypnotized.

Petitioner assumes that the constitutional answer is the same no matter whether the testimony was admitted over objection at trial or whether the fact of hypnosis was discovered later. It is not. The mere existence of newly discovered evidence bearing on a convicted defendant's guilt or innocence is not, in and of itself, a constitutional basis to set aside the criminal judgment. *Townsend v. Sain*, 372 U.S. 293, 317 (1963). The focus is on fundamental fairness in the trial process or interference with some other protected right. For

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(Footnote continued from previous page)

quence of the rape might undergo hypnosis as therapy for the dysfunction. Similarly, an ex-smoker or former alcoholic who is so shaken by a robbery or other crime that he or she resumes drinking or smoking might seek hypnotherapy to quit again. This type of hypnosis does not appear to have created questions about the reliability of a victim's testimony about the circumstances of the crime or to otherwise have created problems for lower courts.

example, a constitutional issue arises when conviction or punishment depends on a prior uncounseled conviction, thus infringing the defendant's sixth amendment interests. *E.g.*, *Loper v. Beto*, 405 U.S. 473 (1972) (impeachment use of uncounseled convictions); *Burgett v. Texas*, 389 U.S. 109 (1967) (increased punishment due to prior uncounseled convictions). Similarly, due process principles of rudimentary fair play and justice may be offended by a conviction based on perjury, but only when the prosecution has deliberately placed perjured testimony into evidence or failed to correct testimony known to be untrue. *See Giglio v. United States*, 405 U.S. 150 (1972); *Napue v. Illinois*, 360 U.S. 264 (1959). Here, there is no direct interference with weighty sixth amendment interests or a violation of fundamental fairness by a prosecutor's knowing use of false testimony or fabricated evidence. The subsequently discovered basis to possibly discredit the victim's testimony therefore is not *per se* of constitutional dimension. Instead, to be constitutionally entitled to a new trial, a defendant must meet what this Court has described as the "severe burden of demonstrating that newly discovered evidence probably would have resulted in acquittal." *United States v. Agurs*, 427 U.S. 97, 111 and n. 19 (1976).

This case therefore has more to do with motions for new trial based on newly discovered evidence—an issue the petition does not address—than it does with the admissibility of post-hypnotic testimony. Petitioner's factual showing at the hearing on the motion for new trial fell far short of demonstrating a basis even to impeach the victim's memory; but at the very least, the trial judge was entitled to find that attacking the victim's credibility on so slender a reed (hypnosis for purposes other than memory-enhancement) would not satisfy petitioner's burden to show he probably would have been acquitted if he had known of the hypnosis at trial. Even so, this case at most represents an occasion to apply settled legal

principles to disputed facts. There is no significant constitutional rule to be clarified or lower court disharmony to be resolved.

II. The question of the admissibility of unstipulated polygraph evidence has not troubled lower courts and does not present a significant question meriting this Court's resolution.

Petitioner argues that the Oregon court's refusal to admit evidence that he had "passed" a polygraph examination violated the Compulsory Process and Due Process Clauses. He claims that the polygraph's reliability has achieved sufficient scientific acceptance that states may not, consistent with the constitution, adopt evidentiary rules that exclude polygraph evidence on a *per se* basis. The state agrees that the issue of the admissibility of polygraph evidence, over one party's objection, is squarely presented in this case. However, we do not agree that it merits certiorari review.

Lower appellate courts, both state and federal, have had little difficulty with this question. The available authority is all but unanimous in holding that polygraph results, absent a stipulation, may not be introduced. *See State v. Brown*, 297 Or. 404, 687 P.2d 751, 771 (1984) and cases cited therein.[2] *See generally* Annot., 92 A.L.R.3d 1317, 1318 (1979 & Supp. 1987); Annot., 53 A.L.R.3d 1005, 1007 (1973 & Supp. 1987); Annot., 43 A.L.R. Fed. 68, 72, 78-83 (1979 & Supp. 1987). The Oregon Supreme Court's rationale for adopting a rule of nonadmissibility typifies the concerns other courts have expressed about polygraph results: scientific disagreement over the test's reliability; test integrity that is highly dependent on the

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[2] Although the Oregon Supreme Court in *Brown* concluded that the lower courts were not fully in accord, the decisions it cites as admitting unstipulated polygraph results have involved peculiar facts and circumstances. We do not read them as general authority for admitting polygraph results over a party's objection.

manner in which the test is administered, the examiner's qualifications and the examiner's subjective interpretation of the results; and a tendency for juries to overvalue polygraph evidence. *See generally State v. Brown*, 687 P.2d at 760-72.

Petitioner nevertheless argues that polygraph results are sufficiently reliable that the constitution compels their admission in a criminal case when they tend to exonerate the accused. The petition does not cite a single case so holding, nor has the state found one. Given the almost uniform suspicion with which courts view unstipulated polygraph results,[3] the dearth of authority for petitioner's position is not surprising.

Petitioner therefore attempts to reason by analogy to this Court's holdings in *Chambers v. Mississippi*, 410 U.S. 284 (1973) and *Rock v. Arkansas*, 107 S.Ct. 2704 (1987), arguing that his right to present his defense is so fundamentally impaired that this Court should determine the admissibility of polygraph results as a matter of constitutional law. However, a comparison of this case with *Chambers* and *Rock* reveals that a *per se* rule of nonadmissibility of polygraph results does not present the constitutional concerns on which those cases turned.

In *Chambers* the defense called someone to the stand who had possibly committed the crime with which the defendant was charged. In order to expose the witness's "damning repudiation" of his story of innocence and his alibi, the

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[3] As the Oregon Supreme Court suggested in *State v. Brown*, 687 P.2d at 776 and n. 35, stipulated polygraph results, which are not involved here, present a wholly different question. Lower courts are sharply divided on their admissibility, some on the theory that the stipulation serves to permit the parties to control the variables deemed significant to the test's fairness and reliability. *E.g.*, *Corbett v. State*, 94 Nev. 643, 584 P.2d 704 (1978). Many courts simply view the stipulation as a waiver of either party's objection. *See State v. Brown*, *supra*, discussing cases.

defense asked to cross-examine him as an adverse witness. The trial court refused the request under a state evidentiary rule that a party who calls a witness "vouches" for his credibility and may not impeach him. The trial court also refused, on hearsay grounds, to admit other evidence that the same individual had confessed to the crime. This Court found that the defendant's right to confront the witnesses against him was fatally undermined by both evidentiary rulings. The Court reasoned that the voucher rule's largely anachronistic rationale no longer served the trial's truth-seeking function and operated to interfere directly with the defendant's ability to defend against the state's charges. *Chambers v. Mississippi*, 410 U.S. at 296-98. Similarly, the hearsay testimony bore assurances of reliability and the reasons for excluding the hearsay did not justify precluding the defendant from presenting witnesses in his defense. *Id.*, 410 U.S. at 302.

In *Rock* the accused was barred from testifying in her murder trial about the details of the shooting because she had previously been through memory-enhancement hypnosis. The trial court ruled the testimony inadmissible under the state's *per se* evidentiary prohibition on hypnosis-refreshed testimony. As this Court observed, the accused was virtually prevented from describing any of the events on the day of the shooting and was not able to describe in her own words the shooting itself. *Rock v. Arkansas*, 107 S.Ct. at 2712. Because the defendant's right to testify on her own behalf was directly infringed and because the state's evidence rule operated across the board, rather than applying only when the hypnosis rendered the testimony unreliable, this Court reversed the conviction. *Id.*, 107 S.Ct. at 2714-15.

Although petitioner attempts to argue that the exclusion of polygraph results is like the exclusion of a defendant's own testimony (*Rock*) or limitations on examining witnesses who have knowledge about the crime (*Chambers*), it is not. The

polygraph examination essentially strives to perform the same function as the jury in a criminal trial, that is, it attempts to determine who is telling the truth. Polygraph evidence is not direct evidence of facts, but instead assesses the credibility of someone who professes knowledge of the facts. In a very real way, it is akin to a witness who claims that when defendant told him what happened, the witness believed defendant was being truthful. It is also similar to the "primitive English trial practice" in which oath-takers or compurgators were called to stand behind a particular party's position in any controversy. *See Chambers v. Mississippi*, 410 U.S. at 296 (discussing the English practice). Thus, as the Oregon Supreme Court has observed, polygraph tests are truly unique and novel for they are the only scientific instrument that attempts to convey to a jury whether a witness has been deceptive or truthful. *State v. Brown*, 687 P.2d at 771. Rather than furthering a defendant's right to take the stand or to present witnesses in his own behalf, polygraph evidence tends toward a head-on conflict with our notions of the function the jury properly should perform. *See, e.g., State v. Lyon*, 304 Or. 221, 744 P.2d 231 (1987) (adopting rule excluding stipulated polygraph evidence in part on the theory that it invades the jury's province).

Thus, the constitutional interests on which petitioner relies simply are not at stake here. Short of invalidating rules that directly prevent a defendant from testifying or from presenting witnesses with knowledge of relevant facts, this Court has deferred to the states in their attempts to create and enforce evidentiary rules by which the defense and the prosecution alike must abide. *See, e.g., Marshall v. Lonberger*, 459 U.S. 422, 438 n. 6 (1983) (the Due Process Clause does not permit the federal courts to engage in finely tuned review of the wisdom of state evidentiary rules). Given the open questions about the reliability of polygraph evidence and the fact that its nonadmission does not directly infringe a defendant's

right to present a defense, evidentiary rules governing polygraph results should not be constitutionalized. The Oregon court's resolution of this issue as a matter of state evidence law comports with this Court's jurisprudence and does not merit certiorari review.

CONCLUSION

For the reasons set forth above, this Court should deny the petition for writ of certiorari.

Respectfully submitted,

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